IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 332

IRVING K. HUTCHINSON, ET AL.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI.

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

INDEX TO REPLY.

Table of Cases.

Text Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 332.

IRVING K. HUTCHINSON, ET AL.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioners, Irving K. Hutchinson, *et al.*, respectfully present to the Court their reply to the answer to the petition for writ of certiorari.

This Court has jurisdiction, power and discretion to award a writ of certiorari on application of petitioners. The case involves substantial federal questions and petitioners are entitled to invoke the judgment of this Court on the question of whether or not federal constitutional rights plainly asserted by them in apt time in the state courts have been denied or not given due recognition by those courts.

There are present in this case, as well as in the companion cases (Nos. 330 and 331), grounds which this Court has many times stated impel it to exercise its discretion to

bring before it for review the record and judgment of a state court, namely,—

1. Rights under the Constitution of the United States were plainly asserted by petitioners in the state courts in apt time at every available opportunity;

2. The federal questions raised and presented in the state courts, upon which petitioners' claims of rights under the Constitution were based, were substantial;

3. The Court either denied, or failed to give due recognition to, or failed or refused to decide the federal constitutional questions;

4. The rights claimed under the Constitution and presented to the State Court for determination were such that the case could not be determined and final judgment rendered without a decision of such claims;

5. The non-federal grounds of decision upon which the case was disposed of by the State Court were not of a character as made the decision of the federal questions unnecessary; and

6. The petitioners seeking writ of certiorari were aggrieved, prejudiced and injured by the final disposition of the case by the State Court.

Respondent does not challenge and therefore concedes that petitioners plainly presented, raised and asserted their claims under the Constitution of the United States, properly and in apt time, both in the Circuit Court of Cook County and in the Supreme Court of Illinois, and that the latter Court failed to pass upon those claims and otherwise failed to give them due recognition. (Pet., pp. 6-10.)

Respondent raises no question as to the presence in the case at bar of the first five above enumerated grounds for issuance of writ of certiorari. Its sole contention is that on the face of the record of the State Court petitioners

were the "successful" parties in that Court and, as a consequence, this Court has no power or jurisdiction to grant a writ of certiorari on an application made by petitioners.

Petitioners' reply to the proposition advanced by respondent is twofold:

1. Even assuming that any such rule of limitation upon the jurisdiction of this Court exists, this case does not come within it. Petitioners were aggrieved and injured by the decision of the Supreme Court of Illinois. The disposition of the case made by that Court was against them rather than in their favor.

2. There is no such limitation, as is asserted by respondent, upon the jurisdiction and power of this Court under § 237(b) of the Judicial Code to issue a writ of certiorari to review the record and judgment of a state court. The power and jurisdiction of this Court in that regard is in no way circumscribed or limited to cases in which the application is made by so-called "unsuccessful" parties.

We shall discuss these grounds of reply in their reverse order:

A.

The jurisdiction and power conferred on this Court by § 237(b) of the Judicial Code to grant a writ of certiorari to a state court to review a decision and judgment of such court is not limited to cases in which the application for the writ is made by one "unsuccessful" in the state court.

Section 237(b) of the Judicial Code (28 U. S. C. sec. 344(b)) confers upon this Court a broad and unlimited discretion to review on writ of certiorari any case involving issues, questions and subject matter coming within the

classes of cases set forth in the statute. The only limitation, if it may be called such, on the *jurisdiction* of this Court to issue its writ of certiorari to a state court is that the subject matter, issues or questions involved in the case of which review is sought must come within one or more of the classes of cases described in the statute.

One of the classes of cases as to which broad discretion is conferred upon this Court to permit review by it on writ of certiorari is that class of cases where, in the proceeding in the state court of which review is sought, "any title, right, privilege or immunity is specially set up or claimed *by either party* under the Constitution". (Emphasis added.) Petitioners by plain and concise statement asserted in their petition (pp. 3-10, 12, 13), that the present case comes within this class of cases. Respondent takes no issue with petitioners in this regard.

The broad discretion conferred upon this Court to issue its writ of certiorari in this class of case appears from the following language of § 237(b), which recites that—

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, *any cause* wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or *claimed by either party* under the Constitution, * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied." (Emphasis added.)

Petitioners fully appreciate and recognize that the exercise by this Court in any case of the broad discretion thus conferred upon it may and will be influenced where it

appears that the petitioners were either directly or indirectly the successful parties in the state court proceeding of which further review is sought. However, this factor has no bearing whatever upon the *jurisdiction and power* of this Court to issue a writ of certiorari in such a case, if it is of the opinion that further review is warranted.

Respondent has erred, in that it has failed to distinguish between the effect upon the jurisdiction of this Court to review *on appeal* a judgment of an inferior court where the party seeking review in this Court on appeal was successful in the court below, and cases under the certiorari statute in which the applicant is seeking to induce this Court to exercise favorably to him the broad discretion which this Court has to review *on certiorari* a judgment and record of a state court.

Each of the six decisions of this Court, which petitioners cite in support of the contention they make that "under the decisions of this Court a successful party cannot ask for review of a cause by certiorari", is a case in which review by this Court was sought by way of appeal. None of the cases involved an application for issuance of a writ of certiorari. It is well settled that the success or lack of success in the Court below on the part of the party seeking review by this Court on appeal, goes to the question of the jurisdiction of this Court to entertain the appeal. (*Robertson & Kirkham,* Jurisdiction of the Supreme Court of the United States, § 118). An appeal is a remedy which may be invoked only by an "aggrieved" party.

On the other hand the certiorari statute, (sec. 237(b), Judicial Code,) authorizes the issuance of writ of certiorari in "any cause" in which any title, right, privilege or immunity under the Constitution was specially set up or claimed in the State Court "by either party".

In each of the six appeal cases cited by respondent, the

issue of jurisdiction of this Court to entertain the cause on appeal was presented in one or the other of two ways: Either (a) the party seeking review had been successful in the court below upon the only issue, which, if it had remained in controversy, would have conferred jurisdiction upon this Court on appeal; (*Anglo-American Prov. Co.* v. *Davis Prov. Co.*, 191 U. S. 376, 377; *Public Service Comm.* v. *Brashear*, 306 U. S. 204, 206;) or (b) the disposition of the case by the court below on the merits was in favor of the appellant seeking review in this Court, and as a result appellant did not occupy in this Court the position of an "aggrieved" party, and no "controversy" was presented so as to give this Court jurisdiction. *New Orleans* v. *Emsheimer*, 181 U. S. 153, 154; *Lewis* v. *U. S.*, 216 U. S. 611, 613; *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645; *Lindheimer* v. *Ill. Bell Telephone Co.*, 292 U. S. 151, 176.

These distinctions between the jurisdiction of this Court on appeal and its jurisdiction on application for writ of certiorari appear to have been recognized by this Court in the *Gold Clause* cases.* The point is not mentioned in the opinion, but this Court granted writ of certiorari to the United States Circuit Court of Appeals on petition of the United States and the Reconstruction Finance Corporation, despite the fact that the decree of which review was sought was in favor of the petitioners. Mr. Chief Justice Hughes in testifying before the Judiciary Committee of the Senate of the United States on S-2176 on March 25, 1935, said of this exercise of jurisdiction in those cases:

> "Another feature of that case was that the Government was the successful party below, and although it was the successful party below, the Court recognized the propriety of the application for certiorari, which the Court granted."

* *U. S.* v. *Bankers Trust Co.* (reported *sub nom* in *Norman* v. *B. & O. R. Co.*), 294 U. S. 240, 294, 295.

While it is true that the writ of certiorari issued to the United States Circuit Court of Appeals before that Court had taken the cases under advisement, it is submitted that the fact this Court granted certiorari indicates that it did not regard the success of the petitioners in the Court below as affecting its jurisdiction under § 240(a) of the Judicial Code to grant the petition. That section of the Judicial Code authorizes the issuance of the writ of certiorari to a United States Circuit Court of Appeals "upon petition of any party". The language of the portion of the certiorari statute applicable to petitions for issuance of the writ for review of State Court proceedings, (section 237(b), Judicial Code,) is equally broad. It authorizes the issuance of the writ of certiorari in "any cause" in which a right, title, privilege or immunity under the Constitution is specially set up or claimed in the state court "by either party".

In the *Gold Clause* cases the question of the power and jurisdiction of this Court to issue its writ of certiorari on the application of a successful party was fully briefed at pages 9-16 of the petition.

B.

Respondent, rather than petitioners, was the "successful" party in the State Court. The disposition of the case by the State Court not only impaired the rights, interests and property of petitioners, but deprived them of their property in violation of their rights under the Constitution of the United States plainly asserted and claimed by them in apt time in that Court.

Before the disposition of this case by the Supreme Court of Illinois, petitioners were possessed of a valid and enforcible decretal judgment against respondent in the Circuit Court of Cook County which stood unvacated and

unimpeached. They had the right to enforce that decree against said respondent by any means available under the laws of Illinois by which judgments and decrees against municipal corporations might be enforced. They had been successful in the Circuit Court of Cook County in their contention that no court had jurisdiction or power to review or otherwise sustain an attack upon their decree on any ground other than lack of jurisdiction on the part of the Circuit Court of Cook County to enter the decree; that such decree was property protected by the Constitution of the United States; and that to deny them the right to enforce said decree by any appropriate or available means provided by the law of Illinois for the enforcement of judgments and decrees against municipal corporations, would destroy the decree, render it a mere scrap of paper, and deprive petitioners of their vested property rights in their decree without due process of law. These contentions were reasserted in the Supreme Court of Illinois, Pet., p. 6.

That Court, applying to petitioners its decisions in two prior cases, (*Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2d) 497, and 385 Ill. 599, 53 N. E. (2d) 596,) to neither of which petitioners were parties, but which involved a decree against respondent similar to petitioners' decree, held that the essential issues in the case at bar had been determined adversely to petitioners in the prior cases. In particular, it held it had determined in the prior cases that decrees against the respondent of the character involved in the case at bar, created no liability against the respondent, that under the Illinois Constitution the respondent could not pay such decrees voluntarily or be compelled to do so by judicial process normally available for the enforcement of judgments and decrees against respondent (R. 193), and that the essential issues respecting the enforcibility against the respondent of the decree held by the petitioners having been adjudicated in the prior

cases adversely to petitioners, the case was rendered moot "since no effective relief could be granted to either party on the questions raised" (R. 196).

This disposition of the case by the Supreme Court of Illinois materially changed petitioners' position, prejudiced their rights and interests, destroyed their decree and deprived them of their private property rights which their decree had adjudicated favorably to them. The petitioners are in the anomalous position of having a decretal judgment of record against respondent which no court has jurisdiction to vacate, and which has not been held to be invalid, but which no court in Illinois will undertake to enforce against respondent in the face of the decision of the Supreme Court of Illinois. The life and core of the decree and judgment have been taken from petitioners, leaving but an empty shell.

Petitioners were further prejudiced in that their claims, —(a) that their decree and their private property rights adjudicated in their favor by such decrees were protected by the Constitution of the United States against impairment and attack and prejudice by any person or any court on grounds other than ones involving the jurisdiction of the Circuit Court of Cook County to enter the decree in the first instance, and (b) that the right of petitioners to judicial process to enforce the decree against respondent, which was the life of the decree, was likewise so protected, —were not passed upon or even alluded to in the opinion of the Supreme Court.

Aside from all other factors, when it is considered that the respondent has been relieved of all obligation on its part to pay or to have enforced against it the money decree of petitioners, it would appear no argument is necessary to demonstrate that respondent was benefited materially by the judgment and decision of the Supreme Court of

Illinois and that petitioners, on the other hand, were and continue to be materially aggrieved.

It is held by this Court in *Love* v. *Griffith*, 266 U. S. 32, 33, as well as in many other cases,* that when, as here, there has been a plain assertion of federal rights in the state court, the parties asserting those rights are entitled to have them judicially determined, and that whether the rights were denied or were not given due recognition or were otherwise ignored by the state court is a question as to which the parties who asserted such rights are entitled to invoke the judgment of this Court. In that case this Court stated that it will look to the case as it stood before the Court of first instance, and if it appears that substantial questions of federal constitutional rights were involved, then this Court will "be astute to avoid hindrances in the way of taking it up". While that case was before this Court on writ of error, the principle announced would seem to apply with even greater force to a case, such as that at bar, in which review is sought on petition for writ of certiorari where the only question presented is whether this Court should in its discretion grant the prayer of the petition.

The holding of the Supreme Court of Illinois that the case was moot was not a non-federal ground of decision which rendered unnecessary the decision of the federal questions. The dismissal of the appeal of the respondent on the ground that the issues of the case had become moot was not based upon any claim that any event such as payment or release of error or vacation of the judgment, had taken place pending the appeal so as to end the controversy between petitioners and respondent. It was based solely on the ground that the Court had, in two other cases involving a decree against respondent other than, but sub-

* Petition in *People* v. *Board*, No. 330, pp. 12-18; Brief, pp. 48-52.

stantially identical with, petitioners' decree, decided in favor of respondent on the issue of respondent's power to pay such a decree and the judgment creditor's right to compel enforcement of such a decree, and that since those decisions effectively disposed of the same questions presented in the case at bar, it would serve no good purpose formally again to pass upon them in the case at bar. The Court thereupon dismissed the case as moot. (R. 196.)

This was a decision against petitioners and in favor of the respondent on the merits, and the fact that the appeal of respondent was dismissed does not bar petitioners from exercising their right to invoke the judgment of this Court on the question whether the Supreme Court of Illinois denied or failed to give due recognition to federal constitutional rights plainly asserted by petitioners in that Court. *Love* v. *Griffith*, 266 U. S. 32, 33.

Petitioners therefore respectfully renew the prayer of their petition for issuance by this Court to the Supreme Court of Illinois of a writ of certiorari to review the decision and judgment of that Court.

Respectfully submitted,

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.

(37)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 332

IRVING K. HUTCHINSON, ET AL.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

PETITION OF IRVING K. HUTCHINSON, ET AL., FOR RECONSIDERATION OF THEIR PETITION FOR WRIT OF CERTIORARI.

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
11 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 332.

IRVING K. HUTCHINSON, ET AL.,
Petitioners.

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

PETITION OF IRVING K. HUTCHINSON, ET AL., FOR RECONSIDERATION OF THEIR PETITION FOR WRIT OF CERTIORARI.

To The Honorable The Supreme Court of the United States:

Irving K. Hutchinson and others, judgment creditors of the Board of Education of the City of Chicago, respectfully pray that this Honorable Court reconsider their petition for writ of certiorari, that it set aside its order of October 9, 1944, denying said petition, and that it award the writ of certiorari as prayed in said petition.

We respectfully submit that

(1) rights and interests under the Constitution of the United States were duly claimed and duly asserted by the petitioners in the state courts, as set forth in the petition at pages 5-10;

(2) the federal constitutional questions presented and the constitutional rights claimed were substantial, as presented in the petition at pages 10-12;

(3) the claims of rights and interests under the federal Constitution urged by petitioners were not decided or given due recognition by the Supreme Court of Illinois, as appears from an examination of its opinion (R. 185-196) and of the petition for rehearing (R. 200-206); and

(4) the non-federal grounds upon which the Supreme Court of Illinois based its decision are untenable and unsubstantial and are not independent of the claims of petitioners under the federal Constitution so that the rights and interests of petitioners can be adjudicated without a decision of the federal constitutional questions.

We respectfully submit that the Supreme Court of Illinois in dismissing the appeal arbitrarily denied to these petitioners their day in court. Whether the rights and interests of petitioners can be adjudicated without a decision of the federal questions asserted by them is in itself a substantial federal question which should move this Court to exercise its judicial discretion to bring the case up for review. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282; *Ward* v. *Love County*, 253 U. S. 17, 22; *Kansas City Southern Ry.* v. *Albers Commission Co.* 223 U. S. 573, 591-594; *C. B. & Q. Ry.* v. *Drainage Comrs.* 200 U. S. 561, 580; *Rogers* v. *Alabama*, 192 U. S. 226, 230.

Respondent, by its answer, does not challenge, and so it must be assumed that it concedes, that the grounds stated in the petition, which this Court has often stated impel it to exercise its discretion to award its writ of certiorari to bring before it for review the judgment and record of a state court, are present in this case. The only ground of opposition to the petition stated in the answer is that petitioner was successful in the state court. We think we

have demonstrated in our reply to the answer that this ground is not well taken. The jurisdiction and power conferred on this Court by Section 237(b) of the Judicial Code to grant a writ of certiorari to a state court to review the decision and judgment of such court is not limited to cases in which the application for the writ is made by one "unsuccessful" in the state court. (Reply, pp. 3-7.) Furthermore, the effect of the decision of the Supreme Court of Illinois is to deprive petitioners of their property in their decrees without due process of law in violation of the Fourteenth Amendment. Reply, pp. 7-11.

The issues in this case are substantially like the issues in No. 330, *People ex rel. Reconstruction Finance Corp. et al.* v. *Board of Education of the City of Chicago, et al.*, with which petitioners have moved that this case be consolidated, and they respectfully refer to the petition for reconsideration in that case for additional support for this petition.

Respectfully submitted,

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
Attorneys for Petitioners.

CERTIFICATE.

We certify that the foregoing motion for reconsideration of Petition for Writ of Certiorari is presented in good faith and not for delay.

Floyd E Thompson

Albert E Jenner Jr